No. 14-1507

IN THE

Supreme Court of the United States

STEVE MICHAEL BEYLUND,

Petitioner,

vs.

GRANT LEVI, Director,
North Dakota Department of Transporation,

Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether it is a reasonable exercise of a state's police power to statutorily imply a motorist's consent to chemical testing of his or her breath, blood, or urine upon lawful arrest for driving under the influence of intoxicants.

2. Whether the North Dakota Supreme Court properly held that the state's criminal penalty for refusing a test did not render the petitioner's consent involuntary.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In the present case, Petitioner seeks reinstatement of his license to drive a car despite conclusive evidence of unquestioned reliability that he did, in fact, drive while intoxicated far above the legal blood alcohol limit. Such a result, gravely endangering the lives of innocent people, is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On August 10, 2013, Petitioner Steve Michael Beylund was lawfully stopped and arrested for suspicion of driving under the influence of intoxicants. *Beylund* v. *Levi*, 859 N. W. 2d 403, 406 (N. D. 2015). Petitioner was generally uncooperative and refused all field sobriety tests requested by the arresting officer claiming he had a "bad leg." *Ibid.* Petitioner agreed, however, to take an onsite preliminary screening test, but he failed to provide an adequate breath sample. *Ibid.* Petitioner was then arrested, taken to the hospital and advised of North Dakota's implied consent law. *Ibid.* Petitioner agreed to take a chemical blood test, which resulted in a blood alcohol concentration ("BAC") of 0.250g/100ml. *Ibid.*

Petitioner's driver's license was suspended for two years at the conclusion of an administrative hearing before a Department of Transportation ("DOT") hearings officer. *Ibid.* Petitioner filed for reconsideration arguing that the blood test was an unconstitutional warrantless search and that North Dakota's implied consent law violates the unconstitutional conditions doctrine. *Ibid.* Reconsideration was granted, but relief was denied. *Id.*, at 407. Petitioner appealed the suspension of his driving privileges. *Ibid.* Both the North Dakota district court and the North Dakota

Supreme Court affirmed the hearing officer's decision. *Ibid.*

SUMMARY OF ARGUMENT

Reasonableness is the touchstone of Fourth Amendment jurisprudence. Implying a lawfully arrested motorist's consent to chemical testing as a matter of law is a reasonable legal tool utilized by all 50 states to obtain probative evidence of intoxication. The public's interest in protecting innocent people and keeping intoxicated motorists off of the roadways is significant in comparison to the privacy interests of an arrested motorist who made the *choice* to drink and drive. A motorist's state granted privilege of operating a motor vehicle must respect the fundamental rights of others to be free from bodily harm.

Criminalizing a lawfully arrested motorist's refusal to chemical testing does not unconstitutionally coerce his or her consent thus rendering it involuntary. North Dakota's use of criminal or threatened criminal penalties to deter criminal behavior is constitutionally permitted. The sate's compelling interest in obtaining blood alcohol concentration evidence of arrested, impaired motorists by criminalizing the choice to refuse is a reasonable means of enforcing its driving under the influence laws and does not unconstitutionally condition a motorist's driving privileges.

ARGUMENT

I. A motorist's statutorily implied consent to submit to a search of his or her breath, blood, or urine after lawful arrest for suspicion of driving while impaired falls within the consent exception to the Fourth Amendment's warrant requirement.

The Fourth Amendment, made applicable to the states by the Fourteenth Amendment, provides that "the people are 'to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, . and no Warrants shall issue, but upon probable cause. . ." *Maryland* v. *Pringle*, 540 U. S. 366, 369 (2003) (*quoting* U. S. Const., Amdt. 4) (emphasis added). The touchstone of Fourth Amendment jurisprudence is reasonableness. *United States* v. *Knights*, 534 U. S. 112, 118 (2001). Other general rules that have been judicially inferred from the Fourth Amendment, such as the preference for warrants and the probable cause standard for warrantless searches, are secondary to the primary reasonableness requirement. These secondary rules may yield in particular circumstances where the important interests make it reasonable to strike the balance in a different place. Thus in *Knights*, the special need to closely supervise probationers made it reasonable to lower the evidence standard to reasonable suspicion and to dispense with the warrant requirement. See *id.*, at 120-122. Although driving a car is a very common activity, it does involve operation of a machine of enormous, potentially destructive power. The toll of death, injury, and destruction that the people of this country suffer every year from someone driving while intoxicated cannot be ignored in favor of blind application of standard rules.

A. Probable Cause Requirement.

Any individual who operates a motor vehicle in North Dakota is deemed to have given consent to a chemical test to determine if alcohol or drugs are present in his or her body.[2] All 50 states have enacted similar implied consent laws. *Missouri* v. *McNeely*, 569 U. S. __, 133 S. Ct. 1552, 1566, 185 L. Ed. 2d 696, 712 (2013) (plurality opinion) (cited below as "*McNeely*"). For the consent law to "kick in," two layers of constitutional protection must first be established. First, the police officer must have reasonable suspicion to believe a motorist is driving under the influence of intoxicants to justify stopping the vehicle for further investigation. See *Terry* v. *Ohio*, 392 U. S. 1, 27 (1968). Second, once reasonable suspicion exists for the stop, the police officer must have probable cause to believe the motorist is actually impaired to justify the motorist's arrest. *United States* v. *Watson*, 423 U. S. 411, 423-424 (1976).

Probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*, 462 U. S. 213, 238 (1983). The police officer's critical assessment of the suspected drunk driver gives rise to probable cause to pursue a chemical test. In an impaired driving scenario, probable cause can be established by the officer's observation of many factors—bloodshot, watery eyes, the smell of alcohol on the driver, admission of

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2. "Any individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test, or tests, of the blood, breath, or urine for the purpose of determining the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine." N. D. Cent. Code § 39-20-01(1).

drinking, actual alcohol containers in the vehicle, slurred speech, delayed motor abilities, failed field sobriety testing, etc.

Only after a police officer places the motorist under arrest and informs the individual that he or she is being charged with DUI is the officer required to advise the motorist that North Dakota law requires the individual to take a chemical test of his or her breath, blood, or urine to determine whether he or she is under the influence of alcohol or drugs.[3] The police officer must also inform the motorist of the penalty for refusing to take a chemical test.[4] If a police officer fails to inform the motorist of the implied consent law and the option to refuse, yet a motorist submits to testing, then the test results are not admissible in a future criminal or

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3. "The test or tests must be administered at the direction of a law enforcement officer only after placing the individual, except individuals mentioned in section 39-20-03, under arrest and informing that individual that the individual is or will be charged with the offense of driving or being in actual physical control of a vehicle upon the public highways while under the influence of intoxicating liquor, drugs, or a combination thereof. For the purposes of this chapter, the taking into custody of a child under section 27-20-13 or an individual under twenty-one years of age satisfies the requirement of an arrest. The law enforcement officer shall determine which of the tests is to be used." N. D. Cent. Code § 39-20-01(2).

4. "The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal of the individual to submit to the test directed by the law enforcement officer may result in a revocation for a minimum of one hundred eighty days and up to three years of the individual's driving privileges." N. D. Cent. Code § 39-20-01(3)(a).

administrative hearing.[5] If the motorist refuses to be tested, no test will be given. However, refusal "is a crime punishable in the same manner as driving under the influence" and the motorist may have his or her driving privileges revoked "for a minimum of one hundred and eighty days and up to three years[.]" N. D. Cent. Code § 39-20-01(3)(a).

The revocation of a motorist's driving privileges is civil and all 50 states impose varying civil penalties on a driver's withdrawal of consent. See, *e.g.*, Me. Rev. Stat., Tit. 29-A, § 2521(6) (driver's license suspended for minimum of 275 days for first refusal, 18 months for second refusal, 4 years for third refusal, and 6 years for fourth refusal); W. Va. Code § 17c-5-7(a) (driver's license suspended for one year or 45 days plus an additional one-year ignition interlock device on the motorist's vehicle for first refusal).

In addition to civil penalties for withdrawal of consent, North Dakota and 14 other states also impose a criminal penalty, either as a separate offense or as an enhancement.[6] In 2013, the North Dakota legislature increased DUI penalties, making test refusal a crime in

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5. "A test administered under this section is not admissible in any criminal or administrative proceeding to determine a violation of section 39-08-01 or this chapter if the law enforcement officer fails to inform the individual charged as required under subdivision a." N. D. Cent. Code § 39-20-01(3)(b).

6. See Alaska Stat. Ann. § 28.35.032; Cal. Veh. Code §§ 23612(D), 23577; Fla. Stat. Ann. § 316.1939; Haw. Rev. Stat. § 291E-68; Kan. Stat. Ann. § 8-1025; La. Rev. Stat. Ann. §§ 14:98.7, 32:666(A)(1)(c); Me. Rev. Stat., Tit. 29-A, § 2521(3)(c); Minn. Stat. Ann. § 169A.20(2), subd. 2; Neb. Rev. Stat. §§ 60-6,197, 60-6,211.02; 75 Pa. Cons. Stat. Ann. § 3804(c); R. I. Gen. Laws Ann. § 31-27-2.1; Tenn. Code Ann. § 55-10-406(c); Vt. Stat. Ann., Tit. 23, § 1201; Va. Code Ann. § 18.2-268.3.

an effort to "enact tougher laws in response to the carnage on our nation's highways." *State* v. *Smith*, 849 N. W. 2d 599, 602-603 (N. D. 2014); see also *South Dakota* v. *Neville*, 459 U. S. 553, 558 (1983). States have a "paramount interest . . . in preserving the safety of its public highways[.]" *Mackey* v. *Montrym*, 443 U. S. 1, 17 (1979). "A state plainly has the right to offer incentives for taking a test that provides the most reliable form of evidence of intoxication for use in subsequent proceedings." *Id.*, at 19.

Prior to 2013, many courts interpreted *Schmerber* v. *California*, 384 U. S. 757 (1966), to hold that the natural dissipation of alcohol from the bloodstream alone was enough to constitute an exigency, thus excepting non-consensual warrantless blood draws from running afoul of the Fourth Amendment. See *McNeely*, 133 S. Ct., at 1558, n. 2, 185 L. Ed. 2d, at 703-704, n. 2 (describing split of authority). Following *Schmerber*, this Court held that a motorist's option to refuse a chemical test was simply a matter of legislative grace and not a constitutional right. *Neville*, 459 U. S., at 563-564. Therefore a motorist's refusal could be introduced into evidence in a subsequent proceeding without violating his or her Fifth Amendment rights. *Ibid.* Thus, law enforcement acted under the premise that an officer could secure a chemical test from an arrested motorist either via consent or force without a warrant. See, *e.g.*, *Burnett* v. *Anchorage*, 806 F 2d 1447, 1450 (CA9 1986).

The DUI enforcement landscape dramatically changed with *McNeely*. This Court held that the natural dissipation of alcohol in a motorist's blood stream alone does not create a *per se* exigency that would justify a non-consensual forced blood draw in every DUI case without a warrant. 133 S. Ct., at 1568, 185 L. Ed. 2d, at 715. Although the *McNeely* plurality

noted that some states have had a positive experience with routinely requiring warrants, see *id.*, 133 S. Ct., at 1566-1567, 185 L. Ed. 2d, at 713, it does not follow that one size fits all. Differences in resources and jurisdiction may render this solution impractical in some jurisdictions. See *id.*, at 133 S. Ct., at 1578, 185 L. Ed. 2d, at 725-726 (Thomas, J., dissenting).

The *McNeely* plurality also recognized the limitations of securing a warrant in many DUI situations and referred to all 50 states' use of implied consent laws and commensurate consequences for withdrawal of consent:

> "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. [Citation.] Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *McNeely*, 133 S. Ct., at 1566, 185 L. Ed. 2d, at 712 (internal citation omitted).

When a motorist is pulled over for suspected drunk driving, the officer has no idea how much alcohol the individual consumed or the type of drugs in his or her system. At that point, an officer only has reasonable suspicion to believe the driver is impaired. After the stop, the officer, "a trained observer and investigator," *Mackey*, 443 U. S., at 14, determines if the preliminary evidence gives rise to probable cause to arrest the motorist for DUI. If the motorist is placed under

arrest, probative evidence of intoxication is necessary to successfully prosecute. The timing to determine the BAC of an arrestee in a DUI situation is critical. "[D]elays in obtaining warrants are unpredictable and potentially lengthy." *McNeely*, 133 S. Ct., at 1578, 185 L. Ed. 2d, at 725-726 (Thomas, J. dissenting).

It is reasonable for a state to want to encourage chemical testing of drivers lawfully arrested for DUI. It is reasonable for a state to want to prevent drunk drivers from killing or injuring innocent people. It is reasonable for a state to mandate consent as an alternative to a warrant as a condition of using its public roadways. It is unreasonable to permit a lawfully arrested drunk driver to go unpunished for a crime he or she committed due to willful lack of cooperation with law enforcement.

Implied consent as a matter of law is a reasonable legal tool utilized by all 50 states to obtain probative evidence of BAC levels of a lawfully arrested motorist. Because both a warrant and statutorily implied consent require probable cause prior to testing, implying the motorist's consent as a matter of law and attaching tough penalties for refusal is an effective first line of defense for states to enforce their DUI laws in an effort to keep habitually impaired drivers off of the roadways.

B. Informed Consent.

The Fourth Amendment protects against unreasonable searches and seizures. "[A] warrantless search of the person is reasonable only if it falls within a recognized exception." *McNeely*, 133 S. Ct., at 1558, 185 L. Ed. 2d, at 704. A chemical test given by a government agent to determine the presence of intoxicants in a motorist's breath, blood, or urine is a search for purposes of Fourth Amendment jurisprudence. *Ibid.* (blood); see also *Skinner* v. *Railway Labor Executives'*

Ass'n, 489 U. S. 602, 616-617 (1989) (breath and urine). One widely recognized exception to the warrant requirement is consent. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 219 (1973); *Zap* v. *United States*, 328 U. S. 624, 630 (1946). Valid consent is to be evaluated under the totality of the circumstances and it must be voluntary and not the product of express or implied duress or coercion. *Schneckloth*, 412 U. S., at 227. Voluntariness is a question of fact to be determined from the circumstances. *Ohio* v. *Robinette*, 519 U. S. 33, 40 (1996).

It is well settled that knowledge of one's right to refuse consent to search need not be established for consent to be constitutionally effective. *Id.*, at 39-40; *United States* v. *Drayton*, 536 U. S. 194, 206-207 (2002); *Schneckloth*, 412 U. S., at 249. North Dakota's statutorily implied consent law, however, gives the motorist the statutory ability to refuse chemical testing and a motorist must be informed of this option even though it is not mandated by the Federal Constitution. N. D. Cent. Code § 39-20-01(3)(a); see also *Robinette*, 519 U. S., at 42 (Ginsburg, J., concurring). Law enforcement cannot force a chemical test and if a motorist refuses, no test will be given. N. D. Cent. Code § 39-20-04(1). This practice is consistent with this Court's holding in *McNeely*, which states that before a police officer can conduct a *non-consensual* chemical search of a motorist who is suspected of DUI, the officer must obtain a search warrant unless exigent circumstances prevented timely procurement of a warrant. 133 S. Ct., at 1563, 185 L. Ed. 2d, at 709. If relying on exigent circumstances, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case. *Id.*, 133 S. Ct., at 1568, 185 L. Ed. 2d, at 715. Instead, the exigency must be determined on a case by case basis to determine reasonableness. *Ibid.*

The two-part process under North Dakota law involves both an implied consent and an actual, informed consent. The law implies consent from the inherently dangerous activity of driving a car on public roads. That is an activity that a person must obtain a government license to engage in, and demonstrating a knowledge of basic motor vehicle law is a condition of obtaining the license. Instead of actually taking a chemical sample based on the implied consent, though, North Dakota gives the driver the power to choose—either give actual, informed consent or face penalties for refusal.

In North Dakota, the motorist must be informed of those penalties for refusal after valid arrest. The motorist is also informed of the consequences of actual consent—if the test results indicate the levels of intoxicants are above the legal limit, it can be used as evidence against him or her in a subsequent criminal prosecution for DUI. Alternatively, consenting to a chemical test can exonerate a non-intoxicated motorist. "[T]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." *Schneckloth*, 412 U. S., at 243.

Informed with the two options and the consequences that follow, the motorist must make a choice. If the motorist chooses to consent, then actual consent is given and it constitutes a valid exception to the warrant requirement. If the motorist chooses not to consent, automatic sanctions for refusal kick in and the police officer cannot rely on actual consent to test. Testing must be achieved per a warrant or other warrant requirement exception. *McNeely*, 133 S. Ct., at 1563, 185 L. Ed. 2d, at 709; see also *People* v. *Harns*, 234

Cal. App. 4th 671, 686, 184 Cal. Rptr. 3d 198, 210 (2015).

Even though every motorist in North Dakota implies consent when driving on the public roadways, under the current statutory guidelines, and consistent with *McNeely*, any consent given must be informed and actual before a test is performed, and Beylund gave such a consent in this case.

C. Voluntariness.

Petitioner argues that the criminal penalty for refusal in and of itself renders consent in every circumstance coerced and thus involuntary. Because the threat of criminal punishment coerced him into agreeing to a chemical blood test, his consent was not "freely and voluntarily" given and therefore invalid.

This Court generally avoids bright line rules when evaluating facts and circumstances implicating the Fourth Amendment. See *Robinette*, 519 U. S., at 39. Determining whether police conduct is coercive requires an inquiry into " 'whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.' " *Drayton*, 536 U. S., at 202 (quoting *Florida* v. *Bostick*, 501 U. S. 429, 436 (1991)). The reasonable person test "is objective and 'presupposes an *innocent* person.' " *Ibid.* (emphasis in original).

In a DUI situation, the motorist is already under arrest when he or she is advised of the implied consent law. Even though a motorist is arrested and not free to leave, he or she has the statutory ability to decline the officer's request to test and terminate that encounter. Petitioner's argument, however, is slightly distinguishable because he is not arguing that the police officer's conduct is coercive, but rather that the statutory

criminal penalty for refusal is *per se* coercive. In other words, he is arguing that the state legislature's penalty is coercive.

"[T]he criminal process often requires suspects and defendants to make difficult choices." *Neville*, 459 U. S., at 564. "[T]he choice to submit or refuse to take a blood alcohol test will not be an easy or pleasant one for a suspect to make." *Ibid.* The role of the legislative branch of government is to create laws. All 50 states have a strong interest in eradicating drunk driving on its roadways. All 50 state legislatures have enacted implied consent laws in an effort to further their interest in removing inebriated drivers from the roads. These laws help ensure that law-abiding citizens are not put in harm's way of someone who chooses to drink alcohol or consume drugs and then operate a motor vehicle. Implied consent to alcohol or drug testing is one legal tool states have "to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *McNeely*, 133 S. Ct., at 1566, 185 L. Ed. 2d, at 712 (plurality opinion).

The legislatures of 15 of those 50 states added another weapon to its drunk driving arsenal by criminally penalizing those who refuse testing after being lawfully arrested for driving while intoxicated. This is not a situation where citizens are randomly pulled over and forced to submit to arbitrary chemical testing. Rather, this is a situation where law enforcement has established probable cause to arrest a motorist *prior* to testing. The police officer has determined in his or her expert, trained capacity that the motorist is impaired

and constitutes a grave danger to others on the public roadways.[7]

The North Dakota legislature decided that the state's interest in keeping the impaired driver off of the road is imperative and that BAC testing is the best physical evidence to be used against that driver in a future criminal proceeding to prevent that driver from going unpunished and driving impaired again.[8] To promote this valid law enforcement technique to hold drunk drivers accountable, elected state officials decided to make punishment for the withdrawal of consent tougher. They decided to make it a crime.

> "Modern community living requires modern scientific methods of crime detection lest the public go unprotected. The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield. The States, through safety measures, modern scientific methods, and strict enforcement of traffic laws, are using all reasonable means to make automobile driving less dangerous." *Breithaupt* v. *Abram*, 352 U. S. 432, 439 (1957) (footnotes omitted).

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7. "The officer whose report of refusal triggers a driver's suspension is a trained observer and investigator. He is, by reason of his training and experience, well suited for the role the statute accords him in the presuspension process. And, as he is personally subject to civil liability for an unlawful arrest and to criminal penalties for willful misrepresentation of the facts, he has every incentive to ascertain accurately and truthfully report the facts." *Mackey*, 443 U. S., at 14.

8. See *State* v. *Won*, 136 Haw. 282, 325-326, 361 P. 3d 1195, 1228-1229 (2015) (Nakayama, J., dissenting) (discussing extreme DUI rates and recidivism).

Whether a criminal penalty for refusing to take a chemical test unconstitutionally coerces a motorist to submit to chemical testing in violation of the individual's Fourth Amendment rights is a question of first impression in this Court. *South Dakota* v. *Neville*, *supra*, a Fifth Amendment case, is, however, instructive on this issue.

In *Neville*, the issue was whether a motorist's refusal to submit to a chemical test pursuant to South Dakota's implied consent law could be introduced as evidence against the motorist in a subsequent criminal proceeding without violating his or her Fifth Amendment right against compelled self-incrimination. 459 U. S., at 554. South Dakota's implied consent law similarly permitted a motorist to refuse chemical testing to "avoid violent confrontations." *Id.*, at 559-560.[9]

To discourage refusals, South Dakota allowed the refusal to be used against the motorist at trial. *Id.*, at 560. This Court stated that "no impermissible coercion is involved when the suspect refuses to submit to take the test, regardless of the form of refusal[.]" *Id.*, at 562. This Court discussed the *choice* faced by the motorist—either submit to testing or refuse. *Ibid.* This Court acknowledged that giving the suspect a choice does not resolve the "compulsion inquiry" in all cases. *Id.*, at 562-563. In a Fifth Amendment scenario where the defendant is told to testify at trial, his or her choices are to testify, falsely testify (risking perjury) or refuse to

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9. Unlike the present case, the direct penalty in South Dakota for refusal was purely civil. *Neville*, 459 U. S., at 560. If a motorist refused, after an administrative hearing, his or her driving privileges could be revoked for one year. *Ibid.* "Such a penalty for refusing to take a blood-alcohol test is unquestionably legitimate, assuming appropriate procedural protections." *Ibid.*

testify (risking contempt). *Id.*, at 563. Forcing a choice of that nature is generally prohibited by the Fifth Amendment. *Ibid.* However, in the DUI context, the choice between submitting to a chemical test or having the refusal used as evidence is permissible. *Ibid.*

Relying on *Schmerber*, this Court stated that because a state can compel a motorist to take a chemical test against his will, the choice of whether to submit to a chemical test is "legitimate" and continues to be legitimate when given "a second option of refusing the test, *with the attendant penalties for making that choice.*" *Ibid.* (emphasis added). This Court further stated, "that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices." *Id.*, at 564.

Neville held that a motorist's refusal to take a chemical test after being lawfully arrested is not a government coerced act, and thus not protected by the Fifth Amendment. *Ibid.* Thus, the motorist's refusal to consent can be used as probative evidence of guilt. *Ibid.* *Neville*'s analysis is highly instructive to this case. Even though *McNeely* narrowed *Schmerber's* holding with regard to forced, warrantless blood draws, the choice faced by a motorist in this Fourth Amendment case is as follows: (1) consent—submit to a chemical test; (2) refuse—the police officer obtains a warrant and forces a chemical test; or (3) refuse—the police officer does not obtain a warrant[10] and no chemical test is

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10. In this scenario, either the officer chooses not to seek a warrant, or alternatively, does seek a warrant, but either the length of time to secure a warrant exceeds two hours, N. D. Cent. Code § 39-20-04.1(1), or a warrant is not approved by a judicial officer. The lack of testing after the suspect's

given. A motorist is also offered a true choice in this situation. The attached penalties for refusal, whether civil or criminal, for making the choice, is similarly not an impermissible coerced act.

The reasonable *sober* motorist who is pulled over on suspicion of impaired driving can choose to cooperate with chemical testing and be let go if the results negate intoxication. The reasonable *intoxicated* motorist can also choose to cooperate with testing, and face the consequences if the results are unfavorable, or can refuse to cooperate. But, if the motorist chooses to refuse, the legislature has made that choice a bit more difficult, which is constitutionally permissible. *Neville*, 459 U. S., at 564.

The states' use of actual or threatened criminal penalties to deter criminal behavior is constitutionally permitted. Otherwise, a criminal act goes unpunished because a savvy DUI suspect knows that refusing a chemical test deprives the state of probative evidence of a crime. Simply because the North Dakota legislature criminally penalizes a motorist's test refusal does not render the implied consent law *per se* coercive, but rather it is a reasonable method of ensuring public safety.

II. North Dakota's implied consent law does not place an unconstitutional condition on a motorist's Fourth Amendment right to be free from unreasonable searches and seizures without a warrant.

The unconstitutional conditions doctrine ordinarily prevents the government from granting or denying a

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refusal is the focus of the third choice.

particular privilege on the condition of relinquishing a constitutional right. See *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 545 (1983). However, as with all Fourth Amendment inquiries, this Court must examine the reasonableness of the condition.

Petitioner contends that North Dakota's implied consent law unconstitutionally conditions his state-granted privilege of operating a motor vehicle upon the requirement that he submit to a chemical test of his breath, blood, or urine. In other words, he claims that because he has a Fourth Amendment right to be free from unwarranted searches and seizures, North Dakota cannot condition the grant or denial of that privilege by mandating he consent to a chemical search of his body without a warrant.

A. Compelling Interest.

The government's objective of conditioning driving privileges on the consent to chemical testing if arrested on suspicion of DUI is to prevent impaired drivers from injuring or killing others. "In 2011, 32,367 people died in the United States in traffic crashes. Thirty-one percent (9878) of those fatalities involved an impaired driver[.]" National Highway Traffic Safety Admin., Traffic Safety Facts, Research Note, Breath Test Refusal Rates in the United States—2011 Update 1 (No. DOT HS 811 881, Mar. 2014).[11] The ability to drive a motor vehicle on a public roadway is not a fundamental right, but rather a privilege that is conditioned upon compliance with statutory licensing procedures. *Hendrick* v. *Maryland*, 235 U. S. 610, 622 (1915) (it is "an exercise of the police power uniformly recog-

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11. http://www.nhtsa.gov/staticfiles/nti/pdf/Breath_Test_Refusal_Rates-811881.pdf (as visited March 10, 2016).

nized as belonging to the States and essential to the preservation of health, safety and comfort of its citizens"). A state may restrict the use of its highways to motorists who have complied with the license, insurance, and vehicle registration laws of its state. *Ibid.*

In addition to administrative regulations, every driver has a duty to exercise a certain level of care when operating a motor vehicle. Motorists, for example, must obey the posted speed limit, must use their headlights when driving at night, and must wear a seatbelt. If they do not, there are consequences. An errant motorist is usually civilly penalized with a monetary fine. However, if a motorist operates a motor vehicle in a reckless or aggressive manner in disregard of the safety of people and property, criminal penalties will attach. See, *e.g.*, Ariz. Rev. Stat. § 28-693 (reckless driving, Class 2 misdemeanor, four months jail time for first offense); Ariz. Rev. Stat. § 28-695 (aggressive driving, Class 1 misdemeanor, six months jail time); Mass. Gen. Laws, Ch. 90 § 17B (drag racing—up to 2 ½ years jail time, plus license suspension).

Drunk driving, like reckless driving or drag racing, is not safe driving. It is putting other innocent people in direct and grave danger. Drunk drivers should face significant consequences for refusing to cooperate with law enforcement's efforts to protect unsuspecting citizens from death or serious bodily harm. This Court must evaluate the state's interest in preventing impaired driving against the Fourth Amendment interests of lawfully arrested, inebriated motorists. See, *e.g.*, *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 555 (1976). The public's interest in protecting innocent people and keeping drunkards off the roads is significant in comparison to the privacy interests of an arrested motorist who made the *choice* to drink and drive, and, if caught, is given the *choice* of whether to

consent to chemical testing or refuse with consequences.

All states have a significant interest in eradicating drunk driving. *Michigan Dept. of State Police* v. *Sitz*, 496 U. S. 444, 451 (1990). Motorists may not ignore laws governing the use of public roadways without consequence. A motorist's state granted *privilege* of operating a motor vehicle must respect the *fundamental right* of others to be free from bodily harm. Privileges are earned, not given.

From an early age, citizens are warned about the dangers of drinking and driving. Public service announcements on the television, radio, and billboards warn that "buzzed driving is drunk driving" and "friends don't let friends drive drunk."[12] When young drivers prepare to take the driver's license examination at the early age of 16, they are warned of the consequences of impaired driving. See, *e.g.*, Dept. of Motor Vehicles, CA Driver Handbook 78-85 (English 2016) (alcohol and drugs).[13] We have all been caught in bumper to bumper traffic due to alcohol or drug related vehicle accidents. We are all familiar with news headlines that show horrific details of innocent families tragically killed by an impaired driver. We may have friends or family who were killed by an impaired driver who chose to drive drunk and who forever changed the lives of others.

If a motorist chooses to drink or ingest drugs and then operate a motor vehicle, it is not because he or she is unaware of its prohibition. Rather, he or she makes

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12. http://www.adcouncil.org/Our-Campaigns/The-Classics/Drunk-Driving-Prevention (as visited March 8, 2016).

13. https://www.dmv.ca.gov/pubs/dl600.pdf (as visited March 10, 2016)

the choice (albeit impaired choice) to ignore the laws and drive anyway.

DUI recidivism rates are very unnerving to the states' law enforcement officers. According to the National Highway Traffic Safety Administration ("NHTSA"), drivers involved in fatal accidents with a BAC of .08 or higher were six times more likely to have a prior DUI conviction or a suspended or revoked driver's license than a non-impaired driver.[14] Repeat offenders are more likely to refuse a chemical test because they know that the use of BAC evidence in a criminal DUI proceeding will provide stronger evidence of criminality than refusal, and in most states will result in more severe penalties.[15] If states were able to place test refusal sanctions on the same playing ground as *per se* BAC test result sanctions, repeat offenders would be less likely to continue driving impaired (for at least a short time period). If the repeat offender eventually hits and kills another, the motorist will be criminally punished and jailed for an extended time period. But states should not have to wait for tragedy to strike to keep impaired motorists from using the public roadways.

The rationale underlying the implied consent law is of paramount importance to public safety and is a valid regulation of the use of public roadways. The government's compelling interest in obtaining BAC evidence

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14. National Highway Traffic Safety Admin., Traffic Safety Facts —2013 Data, Alcohol Impaired Driving 4 (No. DOT HS 812 102, Dec. 2014), http://www-nrd.nhtsa.dot.gov/Pubs/812102.pdf (as visited March 8, 2016).

15. National Highway Traffic Safety Admin., Breath Test Refusals in DWI Enforcement: An Interim Report (Aug. 2005), http://www. nhtsa.gov/staticfiles/nti/pdf/809876.pdf (as visited March 8, 2016).

of arrested, impaired motorists by criminalizing the choice to refuse is a reasonable means of enforcing its DUI laws and does not unconstitutionally condition a motorist's driving privileges.

B. Property Inspections Cases Distinguished.

In *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 526 (1967), a San Francisco city ordinance authorized city housing inspectors to enter any building in the city without reason in order to inspect for code violations. The defendant lessee of a ground floor apartment refused to allow a municipal health inspector to search his personal residence without a warrant. *Ibid.* The defendant was criminally charged with refusing to permit an inspection of his residence. *Id.*, at 527 The defendant argued that the law violated the Fourth and Fourteenth Amendments in that it criminally prosecuted him for refusing to permit a city official to enter his private residence without a warrant and *without probable cause* of a housing code violation. *Ibid.* This Court held that it was unconstitutional to convict the defendant for refusing to consent to the inspection and that he had a constitutional right to demand that the inspectors obtain a warrant prior to any search. *Id.*, at 540.

In *See* v. *Seattle*, 387 U. S. 541 (1967), a Seattle city ordinance permitted the city fire chief to enter all nonresidential buildings and premises without reason to inspect for fire hazards without a warrant. The defendant refused to permit entry into his locked commercial warehouse and was criminally charged for refusal. *Id.*, at 542. Relying on its analysis in *Camara*, this Court held that "appellant may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon appellant's locked warehouse." *Id.*, at 546.

In *City of Los Angeles* v. *Patel*, 576 U. S. __, 135 S. Ct. 2443, 2447-2448, 192 L. Ed. 2d 435, 442 (2015), Los Angeles municipal code mandated every hotel operator to keep a record of specified guest information and allow its inspection by any Los Angeles police officer on demand. Failure to make the guest records available to law enforcement for inspection on demand would result in criminal charges. *Ibid.* Several Los Angeles hotel operators challenged the code as being facially unconstitutional under the Fourth Amendment. *Id.*, 135 S. Ct., at 2447, 192 L. Ed. 2d, at 442. This Court held "that a hotel owner must be afforded an *opportunity* to have a neutral decision maker review an officer's demand to search the registry before he or she faces penalties for failure to comply." *Id.*, 135 S. Ct., at 2453, 192 L. Ed. 2d, at 447 (emphasis in original).

The challenged laws of those three cases all authorized arbitrary, warrantless, and suspicionless searches of property without giving the property owners the statutory ability to refuse the search. The purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara*, *supra*, 387 U. S., at 528. These three administrative search cases all involved criminal penalties for refusing a *suspicionless* search without a warrant. North Dakota's implied consent law, on the other hand, does not authorize an arbitrary, suspicionless search. The motorist must be under arrest after a police officer has determined probable cause exists to believe he or she is driving under the influence of intoxicants, which is a crime. In addition, none of the activities involved in these cases presented as grave a risk to human life as drunk driving. In all three cases, then, the Fourth Amendment rights impaired were far greater and the public interest was far less. The implied consent law applies only to persons who choose to engage in a heavily

regulated activity involving danger to other people. This case is more like *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S., at 619-621, than it is like *Camara*.

The privacy interests of a lawfully arrested motorist who is given a choice to obey the law or refuse is minor in comparison to every citizen's fundamental right to be free from bodily harm. North Dakota's imposition of criminal sanctions on an arrested motorist for refusing a chemical test does not unconstitutionally condition a motorist's Fourth Amendment rights.

III. The federal exclusionary rule does not bar introduction of evidence obtained in violation of a motorist's Fourth Amendment rights at a state administrative driver's license suspension hearing.

If this Court were to conclude that BAC evidence obtained from a motorist under North Dakota's implied consent law was the product of an unconstitutional search, nothing in federal law would preclude introduction of that evidence in a subsequent driver's license suspension hearing.

"[T]he government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the constitution." *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 362 (1998). In an effort to deter illegal searches and seizures, the judicially created "exclusionary rule" prohibits the introduction of illegally seized evidence in situations "where its deterrence benefits outweighs its 'substantial social costs.' " *Id.*, at 363 (quoting *United States* v. *Leon*, 468 U. S. 897, 907 (1984)).

North Dakota does not apply the federal exclusionary rule to license revocation proceedings. In *Holte* v.

North Dakota State Highway Comm'r, 436 N. W. 2d 250, 252 (N. D. 1989), the North Dakota Supreme Court decided not to extend the exclusionary rule to civil proceedings,

> "in view of the legislative purpose to gather reliable evidence of intoxication or non intoxication, the legislative direction to receive in evidence the results of fairly administered chemical tests, our previous holdings that an affirmative refusal is necessary to withdraw the implied consent to take the test, and the role of administrative suspension proceedings in protecting the public[.]" *Ibid.*

Further, driver's license suspension hearings are "separate and distinct" from criminal DUI proceedings. *State* v. *Zimmerman*, 539 N. W. 2d 49, 52 (N. D. 1995) (criminal prosecution and administrative driver's license suspension does not constitute double jeopardy). Civil proceedings were designed to temporarily remove impaired drivers from the highways to protect the traveling public, whereas criminal proceedings seek to punish and deter impaired drivers. *Id.*, at 51.

Section 39-20-07 of North Dakota Century Code governs the evidentiary use of chemical analysis test results. A chemical test report must be admitted into evidence if these four foundational elements are documented or demonstrated:

> "(1) the sample must be properly obtained, (2) the test must be fairly administered, (3) the method and devices used to test the sample must be approved by the director of the state crime laboratory or the director's designee, and (4) the blood test must be performed by an authorized person or by one certified by the director of the state crime laboratory or the director's designee as qualified to perform it."

Filkowski v. *Dir., N. D. Dep't of Transp.*, 862 N. W. 2d 785, 790 (N. D. 2015).

Petitioner seeks to give an expansive interpretation to the requirement that the sample be "properly obtained" so as to include a state Fourth Amendment exclsionary rule. He cites to *State* v. *Jordheim*, 508 N. W. 2d 878, 882 (N. D. 1993), and *State* v. *Friedt*, 735 N. W. 2d 848, 854 (N. D. 2007), for the proposition that the chemical test "must have been the result of a valid arrest or other precondition for its administration' " for it to be "properly obtained." Brief for Petitioner 14. Because his blood test was the product of coerced consent, he claims, the unconstitutional nature of the search requires remand and the blood test results must be excluded. *Ibid.* That is not what "properly obtained" means in the authorities Petitioner cites.

In North Dakota, Form 104 is used to satisfy the foundational elements required by N. D. Cent. Code § 39-20-07(5). Form 104 was drafted by the State Toxicologist and is used when blood is drawn for blood-alcohol analysis. *State* v. *Steier*, 515 N. W. 2d 195, 196 (N. D. 1994); *Jordheim*, 508 N. W. 2d, at 881. In *Jordheim*, the North Dakota Supreme Court stated,

> "[g]iven the detailed directions in Form 104 (6-92), it is difficult to imagine a case when certified compliance with them will not also furnish facial evidence that the sample was properly obtained and the test fairly administered, *if the test was the result of a valid arrest or other precondition for its administration*. See *Wilhelmi* v. *Director of Dep't of Transp.*, 498 N. W. 2d 150 (N. D. 1993); *State* v. *Hansen*, 444 N. W. 2d 330 (N.D. 1989)." *Id.*, at 882 (emphasis added).

The issue in *Hansen*, a criminal DUI case, was whether an arrest of a conscious motorist is required

before a chemical blood test can be compelled. *State* v. *Hansen*, 444 N. W. 2d 330, 331 (N. D. 1989). The North Dakota Supreme Court examined the legislative history of the implied consent statute and held that an arrest is first required. *Id.*, at 333. Because the motorist was not arrested prior to a compelled blood draw, the motorist's blood test results were properly suppressed. *Ibid.*

The issue in *Wilhelmi*, a civil license suspension case, was whether an arrest of an *unconscious* motorist is required before a compelled blood test. *Wilhelmi* v. *Director of Dep't of Transp.*, 498 N. W. 2d 150, 153 (N. D. 1993). The court held that under the state statute an arrest is not a precondition and that probable cause to believe that the unconscious motorist was under the influence of alcohol suffices. *Id.*, at 154. Because the motorist was unconscious when her blood was withdrawn, and there was sufficient evidence of probable cause to justify a chemical blood test, the blood test results were properly admitted. *Id.*, at 156.

Wilhelmi and *Hansen* focus on arrest and probable cause as *statutory* preconditions to chemical testing under the state's implied consent laws. If a conscious motorist was arrested prior to chemical testing, then the statutory precondition to test administration was satisfied, and the sample was "properly obtained." If there was evidence of probable cause to believe an unconscious motorist was under the influence when the accident occurred, then the officer can take a blood test without arrest, and the sample was "properly obtained."

In addition to statutory preconditions, a "properly obtained" blood test refers to its *method of collection* by an authorized technician, not the circumstances that led to its collection, or why it was collected. A signed statement from the qualified individual who drew the

motorist's blood constitutes a testimonial statement whose sole purpose is to establish prima facie evidence that the blood was properly drawn and thus properly obtained. *State ex rel. Roseland* v. *Herauf*, 819 N. W. 2d 546, 552-553 (N. D. 2012). The petitioner does not argue that the method in which his blood was collected was improper. Thus his blood was "properly obtained" as that term is used in the statute.

There is no need to speculate on whether North Dakota would extend the exclusionary rule to civil proceedings and no need to remand for that determination. The North Dakota Supreme Court has expressly addressed the question. In *Holte*, the court refused to exclude the results of a test taken in violation of the right to counsel, stating, "we agree with the rationale of the Iowa Supreme Court in refusing to extend the exclusionary rule to civil proceedings as enunciated in *Westendorf* v. *Iowa Dep't*, 400 N. W. 2d 553, 557 (Iowa 1987)." 436 N. W. 2d, at 252.

Although the right to counsel involved in *Holte* was statutory, *id.*, at 251, the court's decision did not rest on that distinction. To the contrary, the court explicitly relied on the principle that "*constitutional* protections afforded in criminal proceedings are not applicable in administrative license-suspension proceedings." *Id.*, at 252 (emphasis added). Even more clearly on point is the court's express adoption of the rationale in *Westendorf*. That case was a Fourth Amendment case, and it expressly relied on this Court's precedents declining to extend the exclusionary rule to a variety of noncriminal proceedings. See *Westendorf* v. *Iowa Dep't of Transp.*, 400 N. W. 2d 553, 556-557 (Iowa 1987). "We apply the cost-benefit framework delineated in *Lopez-Mendoza*,[16] balancing the potential benefit of excluding unlawfully

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16. *INS* v. *Lopez-Mendoza*, 468 U. S. 1032 (1984).

seized evidence against the resulting cost to societal interests." *Ibid.*

Petitioner claims that "as a matter of North Dakota law, the Department of Transportation may not rely on blood tests performed on a sample taken in violation of an individual's constitutional rights," Brief for Petitioner 14, yet he does not cite any authority that remotely supports that proposition. *Jordheim*, as noted earlier, is about statutory prerequisites. *State* v. *Friedt*, 735 N. W. 2d, at 849-850, is a confrontation objection to the introduction at trial of a form containing statements of the nurse who drew the blood. It has nothing to do with whether the sample was validly obtained.

There is good reason why Petitioner does not cite any North Dakota case on point. The case on point is *Holte*, and it is squarely contrary to his position. *Holte* adopts *Westendorf*, and *Westendorf* adopts *Lopez-Mendoza*. If federal law does not require exclusion of this evidence, then North Dakota law does not either.

IV. Subsequent invalidation of a statutory penalty does not render consent involuntary or coerced.

If this Court concludes that North Dakota's criminal refusal statute is unconstitutional, it does not render the petitioner's consent to chemical testing involuntary.[17] In *Brady* v. *United States*, 397 U. S. 742 (1970), the defendant was charged with kidnapping and faced the maximum penalty of death if convicted. *Id.*, at 743. Upon learning that his co-defendant confessed to the

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17. On this point, *amicus* CJLF respectfully disagrees with the State's position that a remand would be in order. This Court can categorically decide that neither reversal nor remand is required in this situation.

crime and would be available to testify against him, the defendant pled guilty and was sentenced to imprisonment. *Id.*, at 743-744.

After the defendant's plea was entered, this Court ruled that the death penalty provision of 18 U. S. C. § 1201(a) was unconstitutional in that it imposed "an impermissible burden upon the exercise of a constitutional right." *Brady*, 397 U. S., at 746 (quoting *United States* v. *Jackson*, 350 U. S. 570, 572 (1968)). Several years later, the defendant sought to set aside his guilty plea, arguing that it was not voluntarily made and that the possibility of receiving the death penalty was coercive. *Id.*, at 744. This Court held that a defendant may not withdraw or set aside a guilty plea simply because he or she misjudged the consequences of entering the plea or "misapprehended the quality of the State's case or the likely penalties attached to alternate courses of action." *Id.*, at 757.

A guilty plea waives a criminal defendant's constitutional right to a trial before a jury or judge. *Id.*, at 748. The defendant's consent that a conviction may be entered against him or her without a trial must be knowing and voluntary. *Ibid.* Voluntariness is determined by evaluating all of the relevant circumstances surrounding the plea. *Id.*, at 749. The government may not entice a plea by threatening physical harm or mentally coercing a defendant. *Id.*, at 750. However,

> "[t]he State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his

> counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction." *Ibid.*

Here, the petitioner waived his Fourth Amendment rights when he consented to a chemical test after his lawful arrest. Similar to a guilty plea in a criminal case, the petitioner's consent must be knowing and voluntary In *Brady*, this Court held that just because a guilty plea may have been encouraged by the fear of a penalty later struck down does not mean it was involuntary or invalid. *Id.*, at 747. Even if this Court were to find the criminal refusal penalty in the statute is unconstitutional, that would not render the petitioner's consent to chemical testing involuntary or coerced.

There is no need for a remand for an "all the facts and circumstances" determination because *Brady* disposes of the only circumstance petitioner claims. The North Dakota Supreme Court noted that "Beylund alleges no other coercive circumstances, other than the penalties" in the statute. *Beylund* v. *Levi*, 859 N. W. 2d, at 409. *Brady* establishes that a decision to waive rights in order to avoid penalties prescribed in a statute does not become retroactively involuntary when the statute is struck down. No federally protected right of the petitioner was violated in the proceeding suspending his driver's license, regardless of how this Court decides the companion criminal cases. There is nothing else to decide in this case.

CONCLUSION

The judgment of the North Dakota Supreme Court should be affirmed.

March, 2016

Respectfully submitted,

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